CO-OPERATIVE CENTRAL BANK LTD & ANOR

v.

RAILWAY CO-OPERATIVE MULTI-PURPOSE SOCIETY LTD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-734-1995]
4 FEBRUARY 1999

CIVIL PROCEDURE: *Affidavits - Cross-examination of deponent - Principles - Whether necessary to show disputes of facts in issue - Failure to deny or challenge truth of averments in affidavit - Whether fatal*

The respondent had obtained judgment against Koperasi Belia Nasional Bhd ('KOBENA') and had sought to enforce the same by attaching certain shares belonging to KOBENA. The said shares, however, were in the possession of the appellants. The appellants, in the circumstances, applied for leave to intervene in the suit and consequently filed an affidavit ('Harunarashid's affidavit') in support of the application. The respondent did not challenge the truth of Harunarashid's affidavit, but, whilst the appellants' application for leave was pending, applied to the court to cross-examine Harunarashid on his affidavit. The application to cross-examine was allowed by the High Court, whereupon the appellants appealed and argued that: (i) the application to cross-examine was premature as leave to intervene was yet to be granted; (ii) the application to cross-examine had only been filed some seven months after the filing of Harunarashid's afidavit and was therefore tainted by delay; and (iii) there was no basis for cross-examination as the respondent had not denied or challenged the truth of the facts in Harunarashid' affidavit.

Held:
Per Shaik Daud Ismail JCA

[1] The respondent had not shown that there were disputes of facts in issue in the affidavit of Harunarashid to warrant him to be cross-examined, and as the application for leave to intervene was pending before the court, it would be premature to apply to cross-examine the deponent of the affidavit in question.

[2] For the court to order cross-examination of the deponent of the affidavit in support, the respondent must challenge the truth of the averments in the affidavit. Here, nowhere had the affidavit in support of the application to cross-examine specifically denied or challenged the facts as deposed to in Harunarashid's affidavit.

[3] It would appear that the purpose of a cross-examination was to further its attempt to attach the shares belonging to KOBENA. The matters averred to by the respondent could be questioned after the appellants had been made interveners. It appeared that by the application, the respondent was embarking on a fishing expedition.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah memperolehi penghakiman terhadap Koperasi Belia Nasional Berhad ('KOBENA') dan bertindak untuk melaksanakan penghakiman tersebut dengan cara menahan saham-saham tertentu kepunyaan KOBENA. Saham-saham berkenaan, bagaimanapun, berada dalam milik perayu. Perayu, dalam keadaan sedemikian, telah memohon kebenaran untuk mencelah di dalam guaman dan seterusnya memfailkan satu afidavit ('afidavit Harunarashid') bagi menyokong permohonan tersebut. Responden tidak mencabar kebenaran afidavit Harunarashid, namun, ketika permohonan perayu untuk kebenaran masih dalam pendengaran, memohon untuk memeriksa balas Harunarashid berhubung afidavitnya itu. Permohonan untuk memeriksa balas telah dibenarkan oleh Mahkamah Tinggi, bilamana perayu merayu dan berhujah bahawa: (i) permohonan untuk memeriksa balas adalah pramasa kerana kebenaran untuk mencelah masih belum diberi; (ii) permohon untuk memeriksa balas hanya dibuat lebih kurang tujuh bulan selepas pemfailan afidavit Harunarashid dan dengan itu dikotori oleh kelengahan; dan (iii) tiada asas untuk memeriksa balas kerana responden tidak pernah menolak atau mencabar kebenaran fakta-fakta dalam afidavit Harunarashid.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Responden tidak menunjukkan bahawa wujud pertelingkahan fakta yang menjadi isu dalam afidavit Harunarashid bagi membolehkan beliau diperiksa balas dan oleh kerana permohonan untuk kebenaran untuk mencelah masih 'pending' di mahkamah, ianya adalah pramasa untuk memohon memeriksa balas deponen afidavit berkenaan.

[2] Bagi membolehkan mahkamah membuat perintah membenarkan pemeriksaan balas deponen sesuatu afidavit menyokong, responden hendaklah mencabar kebenaran pengataan-pengataan di dalam afidavit tersebut. Di sini, tidak terdapat di mana-mana pun di dalam afidavit yang menyokong permohonan untuk memeriksa balas yang menolak atau mencabar secara khusus fakta-fakta yang diperkatakan dalam afidavit Harusarashid.

[3] Tujuan pemeriksaan balas di sini kelihatannya adalah untuk melanjut percubaan responden untuk menahan saham-saham kepunyaan KOBENA. Perkara-perkata yang diperkatakan oleh responden boleh dibangkit oleh mereka selepas perayu dijadikan pencelah-pencelah. Responden nampaknya sedang melakukan satu expedisi memancing.

[Rayuan dibenarkan.]

Legislation referred to:
Essential (Protection of Depositors) Regulations 1986, reg. 9(1)(b)

For the appellants - Murali Achan; M/s Vijendran & Co
For the respondent - A Kanesalingam; M/s Kanesalingam & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D1-22-2107-89]

Reported by WA Sharif

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal against the decision of the High Court which had allowed an application by respondent to cross-examine one Harunarashid bin Haji Salleh who had affirmed an affidavit dated 6 December 1994, in support of the appellants' application for leave to intervene in a suit between the respondent, The Railway Co-operative Multi-Purpose Society Ltd (RCMPS) and Koperasi Belia Nasional Berhad (KOBENA).

The background leading to the filing of the said affidavit are that RCMPS had filed a suit against KOBENA in 1989 claiming a sum of RM3,200,731.63 with interest owed by KOBENA. On 1 April 1992 a consent judgment for this sum was entered against KOBENA. When KOBENA failed to settle the judgment sum, RCMPS applied to the court to enforce the judgment dated 1 April 1992, by attaching certain shares belonging to KOBENA. The application was heard by the senior assistant registrar and was dismissed. Thereupon RCMPS applied *ex parte* and obtained a mareva injunction against KOBENA on 17 October 1994. The mareva injunction was served on the appellants as the appellants held shares and other assets belonging to KOBENA. On 6 December 1994 the appellants applied for leave to intervene and that application is still pending before the High Court. It was in support of this application that Harunarashid bin Haji Salleh affirmed and filed the affidavit in question. He affirmed the affidavit in his capacity as one of the representatives appointed by Bank Negara for both appellants under reg. 9(1)(b) of the Essential (Protection of Depositors) Regulations 1986.

It was contended firstly by counsel for the appellants that the respondent's application to cross-examine the deponent of the said affidavit is premature as the application for leave to intervene is still pending before the High Court. He contended that once the application for leave to intervene is granted, then it would be proper for the respondent to apply to cross-examine the said deponent. Secondly the said affidavit was filed on 6 December 1994 and the application to cross-examine was only filed on 7 July 1995 some seven months later. Furthermore, the truth of the facts deposed to in the said affidavit had not been denied or challenged by the said respondent. The respondent merely construed those facts differently. Therefore there is no basis to cross-examine the said deponent.

Learned counsel for respondent conceded that in order to intervene a party must persuade the court that it has some interest and affidavits in support of such an application must show this. He, however, contended that if the affidavit in support is unsatisfactory and is in general terms without condescending to particulars, the court would need further questions to be answered. Hence the need to cross-examine the deponent of such affidavit becomes important.

Now, whether to grant or refuse leave to intervene is in the discretion of the court. It is trite law that where any party intends to intervene in a suit pending before the court, it must show it has some interest in the suit. The court will rely on the affidavit in support to determine whether there exists such interest or otherwise. If as is conceded in this case, the affidavit in support is in general terms without condescending to particulars and therefore unsatisfactory then in all probabilities the court will reject the application. For the court to order cross-examination of the deponent of an affidavit in support, the respondent must challenge the truth of the averments in the affidavit. In the present case, no where has the affidavit in support of the application to cross-examine specifically deny or challenge the facts deposed to in the said affidavit. For instance the circumstances by which the appellants came to hold shares, particularly, the shares in United Merchant Group, belonging to KOBENA was explained in the said affidavit in support affirmed by Harunarashid but no where has the affidavit in support of the application to cross-examine affirmed by one Lim Say Hock, the secretary of RCMPS, has denied or challenged this, on the contrary it would appear that the purpose of the cross-examination is to further their attempt to attach the shares. The matters averred to in Lim Say Hock's affidavit can be questioned after the appellants had been made interveners. It appears to us that by their application, the respondent is embarking on a fishing expedition.

We are satisfied that, the respondent has not shown that there are disputes or facts in issue in the affidavit of Harunarashid to warrant him to be cross-examined and as the application for leave to intervene is pending before the court, it is premature to apply to cross-examine the deponent of the affidavit in question. We allowed the appeal with costs and below and ordered the deposit to be refunded to the appellant.

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